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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 268.

MISSOURI-KANSAS PIPE LINE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, *et al.*

No. 269.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, *et al.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

REPLY BRIEF FOR APPELLANTS.

ARTHUR G. LOGAN,
Continental American Building,
Wilmington, Delaware.

ROBERT J. BULKLEY,
Bulkley Building,
Cleveland, Ohio.

RUSSELL HARDY,
Woodward Building,
Washington, D. C.
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

REPLY BRIEF OF APPELLANTS.

Statement.

The present applications are not motions to intervene under the intervention rule. The right to procure the relief sought in these applications exists independently of that

rule. They are based on the language contained in Section V of the Consent Decree of January 29, 1936 as follows:

> "* * * that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

This provision relieves the applicants from the requirements of Rule 24 concerning interventions and gives to Panhandle Eastern an absolute right to become a party for a limited purpose.

PART I.

Reply to Appellees' Briefs in Appeal No. 269.

Reply to Brief of Appellee Columbia Oil & Gasoline Corporation in Appeal No. 269.

I. Reply to Point I.

We take no exception to Point I of Columbia Oil relating to the manner of raising the question of the authority of the attorneys to represent Panhandle Eastern. We are willing that this question should be determined on the motions of Columbia Oil and Columbia Gas.

II. Reply to Point II.

Columbia Oil contends that the order could not be final because it relates only to the authority of attorneys to bring the application, and, therefore, could not foreclose Panhandle Eastern from subsequently authorizing a similar application.

This disregards the fact that the order was based on the finding that the vote of Dunn alone could defeat a resolution to authorize any attorneys to bring any application at any time. Dunn's vote was based upon the decision that

no application should be made by these or any other attorneys and that no relief should be sought under the Decree or in an independent action outside of that case. If Dunn alone, voting on instructions of Columbia Oil, a party against whom the proposed action could be taken, can prevent the application, then there is, to all intents and purposes, a final order which disposes forever of the practical possibility of bringing such an application. To ask this Court to believe that Panhandle Eastern enjoys any vestige of free will or volition to bring an adversary proceeding against Columbia Oil while the latter has power to direct and control the vote of the trustee, is to put an impossible strain on credulity.

Even in intervention cases the rule is that under such circumstances the order is final.

> "* * * The right to review this order, therefore, rests on the inquiry whether it constitutes a final order or decree, within the meaning of the latter proviso and the general rule is well settled that a denial of the right to intervene is not such final decision, and not appealable. Ex parte Cutting, 94 U. S. 14, 22, 24 L. Ed. 49; Guion *v.* Insurance Co., 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895; Credits Commutation Co. *v.* U. S., 177 U. S. 311, 317, 20 Sup. Ct. 636, 44 L. Ed. 782; Id., 62 U. S. App. 728, 732, 34 C. C. A. 12, 91 Fed. 570, 572; Buel *v.* Trust Co., 44 C. C. A. 213, 104 Fed. 839; 1 Fost. Fed. Prac. (3d Ed.) 445. *A just exception to this rule arises,* as intimated in the Credits Commutation Case, supra, '*where the denial* of a third party to intervene therein *would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by intervention,* and where the intervention is not discretionary with the chancellor'; or, as stated in 1 Fost. Fed. Prac., supra, 'where a denial of the right to intervene would be

a practical denial of all the relief to the petitioner perhaps an appeal will lie from an order denying intervention'. But the authorities are uniform in upholding the rule, without regard to advantages which may accrue through the intervention, *provided relief upon the intervener's claim is not foreclosed by the denial.*" (Italics ours.)

In re Columbia Real Estate Co., 112 F. 643, 645 (C. C. A. 7th).

In *State of Washington* v. *United States*, 87 F. (2d) 421, 433 (C. C. A. 9th), the Court said:

"With exceptions not here pertinent, an appeal to this court can be taken only from a *final* decision of the District Court. 28 U. S. C. A. §225. Although the cases generally state various tests to ascertain whether or not an order denying intervention is appealable, the primary question is: Is the order denying intervention a final decision?

"The test ordinarily applied to determine whether an order is final is that an order is final if it will 'terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered'. Bostwick *v.* Brinkerhoff, 106 U. S. 3, 1 S. Ct. 15, 16, 27 L. Ed. 73. As applied to a controversy between parties to the suit and parties attempting to intervene, this simply means that if the order denying intervention terminates the litigation of the question sought to be litigated between such parties, then the order is final and appealable,* under the express terms of the statute. On the other hand, if the litigation of the question sought to be litigated is not terminated, then the order is not ap-

* Complete annotation of all cases on point set forth in note 18 in the opinion.

pealable,* because the order does not 'terminate the litigation between the parties on the merits of the case.'

"Ordinarily, the denial of the petition adjudicates nothing but the right to intervene, and has no force as *res judicata* on the merits. Such a denial 'leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding.' In other words, the petitioner in an independent proceeding of some kind may litigate the same question which he seeks to litigate by intervention. If there is any 'other appropriate form of proceeding' open to the intervener, the order denying intervention is not final, and therefore not appealable, because the order does not 'terminate the litigation between the parties on the merits of the case.'

"However, it sometimes appears that the interveners have no remedy to litigate their question, except by intervening in an existing action or suit. In such cases, unless the interveners are permitted to litigate their questions in the pending litigation, their rights, whatever they may be, will be entirely lost, for they have no remedy by which such rights may be protected or adjudicated. An order denying such parties leave to intervene is, as this court stated in its first decision touching the question 'a practical denial of all relief to the petitioner.' Therefore such an order is final and appealable."

See also

United States v. *Radice*, 40 F. (2d) 445 (C. C. A. 2d);

United States v. *Philips, Judge*, 107 F. 824 (C. C. A. 8th);

United States Trust Co. v. *Chicago Terminal T. R. Co.*, 188 F. 292, 296 (C. C. A. 7th).

* Complete annotation of all cases on point set forth in note 19 in the opinion.

III. Reply to Point III.

Columbia Oil contends that the court below was correct in dismissing the intervention application in the name of Panhandle Eastern Pipe Line Company because it was not authorized by the Company, and the attorneys making said application and prosecuting this appeal have not been authorized to act in its behalf. This depends on the validity of Dunn's vote, which was the only vote cast against the resolution authorizing the application and the employment of the attorneys (R. 462).

We do not press the contention made at the stockholders' meeting that the Consent Decree required Dunn to have specific instructions from the beneficial owner of the stock with respect to each vote. It nevertheless remains clear that, except in the single contingency where the trustee believes the instructions to be inconsistent with the purposes of the decree, he can vote only pursuant to directions from the beneficial owner. The terms of the Consent Decree confine his discretion to the single question of whether any specific instruction is contrary to the purposes of the decree. Whatever further right the trustee might have to vote must be conferred by instructions from the beneficial owner. Any such general instructions giving discretion to the trustee surely could not validate a vote which would not be valid if cast pursuant to a specific instruction; and certainly a specific instruction could not be given by Columbia Oil to vote its shares in opposition to a motion to bring a proceeding against Columbia Oil itself for the purpose of enforcing the express provisions of the Consent Decree. Even if the trustee had been specifically instructed so to vote, he should have found that the instruction was contrary to the intent and purpose of the Consent Decree itself.

The attempted inference of Columbia Oil's brief in Appeal #269 (pp. 12, 19) that Dunn's vote against the resolution to authorize this action was held valid by the Chancery Court of Delaware is unjustified and unfair. An examination of the Chancellor's Decree and letter commencing at page 37 and page 39 of the same brief shows that he dealt only with the election of corporate officers and directors, which could not involve any question as to whether opposition to the proposed authorization of legal action was inconsistent with the purpose of the Consent Decree. The validity of Dunn's vote on that question was not in issue or even considered.

Reply to Brief of Appellee Columbia Gas & Electric Company in Appeal No. 269.

I. Reply to Point I.

As stated before, we take no exception to raising the question of the authority to represent Panhandle Eastern by the motions.

II. Reply to Point II.

Under Point II appellee, Columbia Gas, takes the position "that the directors of a corporation are the only persons who can institute an action on behalf of and in the name of the corporation" (Brief, p. 18).

Columbia Gas does not cite any authorities in support of this statement which it nevertheless states is "well settled." The authorities quoted on page 19 of the brief have nothing to do with this problem as the same are quotations concerning rights of individual stockholders and not the rights of stockholders acting in meeting. The authorities cited on pages 20-24, inclusive, are likewise cases which have nothing to do with the instant problem as the same define the rights of individual stockholders either suing in

their own capacities or in derivative capacities. However, these derivative cases do clearly show that a resolution passed at an annual stockholders' meeting directing a corporation to sue supersedes any discretion in directors, because one of the conditions precedent to a successful derivative suit is that demand to sue be made on the stockholders.

In *United Copper Securities Co.* vs. *Amalgamated Copper Co.*, 244 U. S. 261, 263-264, this Court pointed out:

> "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and *is left to the discretion of the directors, in the absence of instruction by vote of the stockholders.* Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, *only after application to the stockholders,* * * *. * * * No application appears to have been made to the stockholders as a body. * * *." (Italics ours.)

Apparently Columbia Gas is confused concerning the true nature of the authority under which the application was filed by Panhandle Eastern. At the annual meeting of stockholders of Panhandle Eastern, on March 11, 1940, a resolution was proposed authorizing the filing of the instant application. The question of whether or not it was passed is treated in our main brief, and elsewhere herein, pages 6 and 7. If the resolution was properly passed, then the application herein was one made by Panhandle Eastern under and by virtue of the resolution adopted at the annual meeting of stockholders. If the resolution was

not adopted, then, of course, the instant application was not properly filed. The question has nothing to do with derivative actions nor with stockholders acting in their individual capacities.

Section 2, paragraph 2, of the Delaware Corporation Law, authorizes Delaware corporations: "to sue and be sued, complain and defend in any court of law or equity."

Section 3 of the Delaware Corporation Law places this power in the stockholders. Section 3, which allows additional powers to corporations provides: "In addition to the powers enumerated in the second section of this Chapter, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges" etc.

In other words, the power contained in section 2, paragraph 2, "to sue" is placed in the corporation, its officers, directors and stockholders. The by-laws of Panhandle Eastern, under which the respective rights of officers, directors and stockholders are set forth, do not specifically state whether the right to exercise the power "to sue" shall be in the directors or stockholders, but instead, in Article 13, provide generally as follows:

> "13. The Board of Directors *may* exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the Certificate of Incorporation, or by these By-Laws, directed or required to be exercised or done by the stockholders" (Record, 491).

From this we find that the stockholders conferred permission upon the directors to exercise the power to sue but in doing so did not abrogate the right themselves to exercise such power, as the right is merely that the directors "may exercise" this power. The delegation of this

power, being a permissive one, did not curtail the st
holders' own power to exercise it.

In the case of *Rogers* vs. *Hill*, 289 U. S. 582, 77 L.
1385, a statute provided that the stockholders "may"
fer upon directors the power to make and alter the by-l
This was done. Subsequently, at an annual meeting,
stockholders themselves adopted a new by-law. This C
said at pages 588-589:

> "* * * But plaintiff argues that the stockhol
> having delegated to the directors authority to a
> by-laws lost the power to adopt the one in ques
> That is inconsistent with the purpose of the sta
> Power to prescribe rules for the government of b
> ness corporations reasonably is deemed an inci
> *of ownership and the voting power of the shares*
> is quite generally conferred by statute or cha
> provisions upon the stockholders. Here the st
> tory grant to them is plenary. The charter provi
> is subordinate and not inconsistent. There are m
> thousand holders of shares of this corporation. T
> annual meetings are the only regular ones, but
> directors meet frequently. The company's busi
> is extensive and complex and considerations of
> venience may have suggested delegation to direc
> of authority to make and alter by-laws.
>
> That the statute did not intend to divest st
> holders is clear for it expressly makes by-laws pa
> by directors subject to alteration and repeal by
> stockholders. *In the absence of statutory provi*
> *definitely and clearly disclosing that intentio*
> charter provision or *by-law adopted by incorpora*
> *or shareholders delegating power to directors*
> *not reasonably be held to take from the stockhol*
> *any of the power conferred upon them by the sta*
> Plaintiff's contention would leave the stockhol
> full power to alter and repeal by-laws made by di
> tors but would deny them power to originate or a

> any by-law or to amend or repeal those made by themselves. We find no reason in support of that construction. Moreover, it seems in direct conflict with the decision of the highest court of New Jersey. In the case of Re A. A. Griffing Iron Co., 63 N. J. L. 168, 41 Atl. 931, affirmed in the Court of Errors and Appeals on the opinion below, 63 N. J. L. 357, 46 Atl. 1097, the court declared (p. 171): * * * "That the stockholders had delegated to the directors power to amend the by-laws did not curtail their own power to amend them, and of course the later statute [Revision, 1896] removed all possible restriction on such power. * * *It would be preposterous to leave the real owners of the corporate property at the mercy of their agents, and the law has not done so.'" (Italics ours.)

Columbia Gas apparently does not recognize that the stockholders, assembled in meeting as they were at the annual meeting on March 11, 1940, constitute the corporation itself and that their actions are superior to any action which the directors could take, at least within the field where they have joint jurisdiction, such as in connection with the exercise of the power "to sue," where the by-laws merely provide that the same *may* be exercised by the directors, and where the statute says that the same shall be in directors and stockholders.

In 5 Fletcher Cyc. Corp. (Perm. Ed.), Sec. 2097, pages 337-338, we find the following statement indicating the relative role of stockholders and directors in a matter such as this:

> *"In the absence of a provision to the contrary in the charter of a corporation or the general law, the management and control of the corporation is vested primarily in the stockholders or members collectively, as constituting the corporation, and in them alone.* No one else can act for or bind the corpo-

> ration unless authorized by them, or by the charter or general law; and it is for them to elect or appoint the officers or agents to represent and act for the corporation, and to define their powers, unless there is some charter or statutory provision to the contrary. In other words, if there is no statute nor charter provision vesting control in a board of directors or trustees, then the stockholders retain the right to manage the corporation, although in such a case they may confer by a by-law such power upon the board of directors or trustees. What the stockholders thus exercise is power, the corporate power, granted them as a collective body—the corporation—by the state in the charter; and what the directors or officers exercise is authority given to them by law for the corporation or by it. *In this sense and subject to qualifications hereafter noted, stockholders or members of a corporation represent and may bind the corporation by vote of the majority at a corporate meeting,* * * *" (Italics ours.)

Thus, in the event the Court finds that the vote of Gano Dunn should have been rejected, and accordingly finds that the resolution to authorize the application was passed, the Court should find that the resolution was the act of the corporation and the application was properly filed pursuant to such act, as the stockholders had retained the right to exercise the power "to sue".

III. Reply to Point III.

We repeat here the argument contained in reply to Point III in the brief of Columbia Oil, *supra*, pages 6 and 7.

IV. Reply to Point IV.

We repeat that the proceedings in the Delaware Court of Chancery related only to the election of officers and directors and did not involve any issue or question concerning the resolution to bring the instant application.

Finally, Columbia Gas urges that only a derivative action would raise the question of whether or not the instant resolution passed. A derivative action could only be brought on the theory that the resolution was defeated. We contend it passed. That is the issue on this appeal.

PART II.

Reply to Appellees' Briefs in Appeal No. 268.

Reply to Brief of Columbia Oil & Gasoline Corporation in Appeal Case No. 268.

Statement.

Columbia Oil persists throughout its brief in stating that the instant application in Appeal No. 268, is Mokan's fourth intervention petition. This is a misstatement of the record. Mokan did file two motions seeking leave to intervene which were denied (R. 321, 371). Those were filed by Mokan in its own right.

The instant application is the first and only application that has ever been made by Mokan *in the right of* Panhandle Eastern. The application in Appeal Case No. 269 is not by Mokan.

I. Reply to Point I.

We have set forth, *supra,* pages 3 to 5 inclusive, the authorities showing that when an application to be made a party is denied, the order denying the same is appealable where, as here, there would be a practical denial of certain relief to which the applicant is fairly entitled. This rule is recognized by this Court in the case of *Credits Commutation Co.* v. *U. S.,* 177 U. S. 311. In the recent case of *In re Dolcater,* 106 Fed. 2d, 30, 31, the Court pointed out that an appeal from an application to intervene should be allowed where the "intervention is so essential to the preservation of the petitioner's rights". Applying to our situation the rule recognized by this Court, *supra,* clearly demonstrates the appealability of the decree which denied to Mokan the right to seek, on behalf of Panhandle Eastern, the relief which Section V provides may be obtained in this case. Section IV of the Consent Decree deals with specific rights and Section V states that Panhandle Eastern may, upon proper application, enforce these as a party. How else could Panhandle Eastern enforce these rights? It is obvious that the same rights cannot be appropriately asserted in any other proceeding.

The denial of the application cannot be a discretionary matter because under the terms of the Consent Decree itself the only limitation provided upon the right of Panhandle Eastern to be made a party is that a proper application be made. The words "upon proper application" cannot be interpreted as having the same meaning as "in the Court's discretion". If "proper application" was made, then the Court was without discretion in the matter, as the right was absolute. The denial of this absolute right was a final adjudication.

In the case of *U. S.* v. *Phillips, Judge,* 107 Fed. 824 (C. C. A. 8) the Court said:

> "When a Chancellor denies the right to intervene in a case belonging to the second class (where right to intervene is absolute) an appeal lies because the Chancellor's action was not discretionary, and because such action was a final adjudication in that it denied him relief which he could obtain only by an intervention in the pending cause."

II. Reply to Point II.

We refer to our Statements as to Jurisdiction in No. 268 and No. 269 in reply to this Point II of Appellee and to the statements contained herein, *supra,* pages 2 to 5 with respect to the final nature of the order entered by the District Court.

Columbia Oil takes the position that "Mokan is free to institute *an action for damages* outside of this suit" and that therefore the decree below was not a final one (brief, p. 35). That is not the issue. The decree below is certainly a final determination that Panhandle Eastern shall not be a party to this action for the purposes set out in its prayers. Any relief which might be had outside this case is not the same relief as could be had by Panhandle Eastern as a party to the instant case. In *U. S.* v. *California Cooperative Canneries,* 279 U. S. 533, this court indicated that orders denying intervention to those who have a direct and immediate interest in the *res* which is the subject of the suit are appealable. This Court said at page 556:

> "That Court" (the Court of Appeals of the District of Columbia) "* * * did not refer to the decisions which hold that an order denying leave to intervene is not appealable (Citations), except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit (Citations)."

The instant appeal comes directly within the exception specifically recognized by this Court because the *res* "which is the subject" of the suit below is the right of Panhandle Eastern to engage in interstate commerce unmolested by unlawful restraints of these defendants, and the instant application is made in the right of one who "has a direct and immediate interest" in that *res*. Furthermore, the exception hereinabove set forth concerning finality and lack of opportunity to assert rights in other proceedings is so inherent in this matter as to create a sound exception giving rights to an immediate appeal under the Expediting Act to this Court.

III. Reply to Point III.

The doctrine of *res adjudicata* is not applicable and does not estop Mokan from asserting the rights of Panhandle Eastern as it seeks to do herein for the following reasons:

(a) The first Mokan intervention petition was not in the right of Panhandle Eastern. The instant application is. The Mokan motion of February 6, 1939 did not ask that Panhandle Eastern be made a party, nor did the petition annexed thereto, (R. 284) and so the granting of that motion would not have made Panhandle Eastern a party. It follows that the denial of the motion cannot operate as *res adjudicata* against Panhandle Eastern's right under Section V to become a party. Both the order and the opinion of the court below confirm the view that the motion was not in Panhandle Eastern's right.

But appellee's contention would not be helped by admitting that the Mokan motion was intended to make use of such right, for in that case it was subject to the fatal defect of failing to make Panhandle Eastern a party

thereto; and so the denial of that motion was not an adjudication of the merits of Panhandle Eastern's right. Intention is no substitute for necessary allegations or necessary parties.

Nor could the denial of that motion be a final determination even of the right of Mokan to make application derivatively in the right of Panhandle Eastern, since the failure to ask that Panhandle Eastern be made a party was a formal defect sufficient to justify the denial of the motion without prejudice to Mokan's right to present subsequently a proper motion or application.

In order to bring a derivative action on behalf of a corporation it is necessary that the corporation be made a party.

Davenport v. *Dows,* 18 Wall. 626 (1873).

The reason is, as this Court pointed out in the *Davenport* case that the rights asserted by the stockholder are the rights of the corporation and therefore:

> "manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder," etc.

See also:

Cantor vs. *Sachs, et al.,* 18 Del. Ch. 359, 162 Atl. 73;

Ainscow v. *Sanitary Company of America,* (Del. Ch.) 180 Atl. 614.

In other words one of the essentials in order for a judgment to give rise to the doctrine of *res adjudicata* was not

present in the first two petitions to intervene, namely, "the proper parties must be present".

Black on Judgments, Vol. I, Section 242, page 358.

Even if the decree appealed from had sought to pass upon Panhandle Eastern's rights which are herein asserted, the judgment would have been invalid because Panhandle Eastern was not a party, and therefore would not give rise to the doctrine of *res adjudicata.*

Black on Judgments, Vol. I, Section 242, page 358.

Columbia Gas itself originally took the position that the first intervention petition could not have been in the right of Panhandle Eastern. On page 24 of the brief filed by Columbia Gas in opposition to the first motion of Mokan to intervene, the denial of which Columbia Gas now contends has worked an estoppel, Columbia Gas said:

> *"On the Supposition that this petition should be considered as filed by Mokan in the right of Panhandle Eastern."*
>
> "If the petition is considered as filed, not in the right of Mokan, but in the right of Panhandle Eastern, on the analogy of a minority stockholder's bill, it is vitally defective for its failure to comply with certain essentials for the filing of a minority stockholder's bill, namely (1) its absence to show that the directors of Panhandle Eastern were guilty of bad faith and misconduct in refusing to bring suit and (2) its affirmative showing that petitioner was not a stockholder of Panhandle Eastern at the time of the acts complained of and (3) its failure to join Panhandle Eastern as a party defendant."

Columbia Gas then took up the three alleged defects in order and after extensively arguing its points (1) and (2), made the following argument concerning point (3):

> "(3) The petition does not join Panhandle Eastern as a defendant. In a suit in which stockholders sue on behalf of the corporation, it is well settled that the corporation is an indispensable party. It is probably superfluous to cite authorities for such a well-settled proposition, but, from a multitude of those available, we may cite *Davenport* v. *Dows,* 18 Wall. 626.
>
> (Columbia Gas here quotes from several cases.)
>
> "In the instant case, if the petition be construed as brought in the right of Panhandle Eastern, it is consequently fatally defective because of the failure to join the Panhandle Eastern as a party defendant."
>
> (Col. Gas. Brief in Court below, pp. 29-30.)

In the brief of Columbia Oil filed with the District Court at that time, we find the following on page 23:

> "In passing, it should be noted that if Mokan's petition is filed in behalf of itself and for the benefit of Panhandle Eastern on the analogy of a minority stockholders' bill then the petition is vitally defective as it has failed to join Panhandle Eastern as a necessary party defendant.
>
> "*Kelly* v. *Mississippi River Coaling Company,* 175 Fed., 482."

The first petition filed by Mokan to intervene was not in the right of Panhandle Eastern, but if the language contained in Paragraph XXXIII should be construed as an indication that Mokan was seeking to intervene in the right of Panhandle Eastern, the petition was as Columbia Gas then said, "fatally defective because of the failure to join

the Panhandle Eastern as a party defendant". Of course, the doctrine of *res adjudicata* is not applicable in either event.

Mokan is entitled in this derivative application to have the rights asserted by it "measured by the right of the corporation (Panhandle Eastern) to such relief".

> *Arn* vs. *Dunnett,* 93 Fed. (2d) 634 (C. C. A. 10th), certiorari denied 304 U. S. 577;
> *Dickerman* vs. *Northern Trust Co.,* 176 U. S. 181, 44 Law Ed. 423.

(b) The denials by the lower court of Mokan's two earlier motions for leave to intervene were not on the merits. In *Bigelow on Estoppel,* Sixth Edition, Page 65, the author states:

> "* * * a judgment, in order to work an estoppel against another litigation upon the same cause of action, must have been rendered upon the merits of the cause. If the decision was rendered upon a mere motion or a summary application, or if the case was dismissed on some preliminary ground * * * for want of jurisdiction, deficiency in the pleadings * * * or the like, the parties are at liberty to raise the main issue again" etc.

Much of the appellee's brief in this Court is devoted to a comparison of the ultimate substantive facts stated in the several applications, on the theory that there has been a final judgment on the merits. But at no stage have these facts been considered or an adjudication been based upon them. In short, no judgment has been entered upon the merits. The effect of the several orders has been to prevent this by barring entry into that substantive field of controversy. If appellee's theory be correct it is not now

possible for either Mokan or Panhandle Eastern, at any time in any tribunal, to procure any hearing and adjudication upon the merits of the controversy.

IV. Reply to Point IV.

The Government and both Columbia companies stipulated that the Consent Decree be entered and, therefore, are now estopped from urging that the rights conferred on Panhandle Eastern by Sections IV and V cannot be litigated in the suit below. The prayers of the Mokan application state the type of relief Sections IV and V contemplated, but the Court below, if it finds that the prayers go beyond the relief permitted by these Sections, will, of course, limit the relief accordingly.

V. Reply to Point V.

The application does not attack the Consent Decree nor seek to modify the provisions thereof. See *infra*, pp. 32-39.

VI. Reply to Point VI.

Columbia Oil's contention that the relief contemplated by Sections IV and V should be denied under the doctrine of laches is based upon the claim that the cause of action accrued in 1936. The cause of action asserted in the instant application is based upon the continuing use of the properties, as well as upon the acquisition by Columbia Oil of the stock and the acquisition by Columbia Gas of the extension.

In its brief Columbia Oil states, but without any record support: "considerable sums of money have been expended by Columbia Oil in reliance upon these agreements." No suggestion is to be found in the Record that Columbia Oil has suffered any loss whatsoever or has changed its position

since the cause of action arose. Nor is any showing made that any loss will be suffered. On the other hand, the instant application points out that Columbia Gas has secured unconscionable and excessive returns on its investments by virtue of the violations of the terms of the consent decree (R. 531, 535-537). The defense of laches requires not mere lapse of time, but also a change of position to the detriment of the person against whom a right is asserted. In the case of *Bay Newfoundland Co.* v. *Wilson & Co.*, 4 A. 2d. (Del. Ch.) 668 at 671, the Court states the rule:

> "It seems that the equitable rule, with respect to laches, is not ordinarily based on the mere delay of a complainant in asserting his rights, but on delay that works a disadvantage to another, after notice of the invasion of such rights. Chase *v.* Chase, 20 R. I. 202, 37 A. 804; 4 Pom. Eq. Jr. (4th Ed.) p. 3418; Scotton *et al. v.* Wright *et al.*, 13 Del. Ch. 214, 117 A. 131."

See also: *Frank* v. *Wilson and Co.*, 9 A. 2d. 82, 86.

Reply to Brief of Columbia Gas & Electric Corporation in Appeal Case No. 268.

I. Reply to Point I.

The contention of Columbia Gas that the failure "to join Panhandle Eastern as a party is a bar to any proceeding on this application" is untenable. Mokan sought to make the application on behalf of Panhandle Eastern and prayed for "the relief to which Panhandle Eastern is entitled under Sections IV and V of the decree". Mokan recognized that, as it was asserting derivative rights, Panhandle Eastern would have to be made a party to the cause as the rights were being asserted on its behalf

and the judgment would have to be in favor of Panhandle Eastern. *Ainscrow* vs. *Sanitary Co. of America* (Del. Ch.), 180 A. 614; *Canton, et al.* vs. *Sachs, et al.*, 18 (Del. Ch.), 359. 162 A. 73. Recognizing this principle, Mokan in its prayer Number 5 asked that "Panhandle Eastern be cited to appear before the court" (R. 540).

As Mokan asked that an order be entered citing Panhandle Eastern to appear, it complied with all possible requirements. Of course, in an ordinary derivative suit started by a stockholder, parties are named and subpoenas issued, but where, as here, application had to be made to the court to file the application and to bring new parties into the suit, Mokan's prayer that Panhandle Eastern be cited was sufficient. The application was denied, which constituted a denial of the prayer to make Panhandle Eastern a party. That is part of the action which we are asking this court to reverse. Had the court below granted our application and cited Panhandle Eastern to appear, then, of course, it would have been before that court and any decree made on the merits would conclude it as this Court has said must be done. *Davenport* vs. *Dows*, 18 Wall. 626.

II. Reply to Point II.

On pages 2 to 5, *supra*, we have reviewed the reasons and set forth the authorities showing orders such as those entered by the court below are appealable. There we applied the cases to the application filed by Panhandle Eastern. Even more certain is the situation with respect to the instant application filed by Mokan in the right of Panhandle Eastern because the denial, if not reversed, would forever bar Mokan from asserting on behalf of Panhandle Eastern (in the event Panhandle Eastern continues under domination which causes it to refuse to assert its rights), the limited rights to which Panhandle Eastern is entitled

under Sections IV and V of the Consent Decree. As it would be impossible to assert said rights in any other form of proceeding, the denial is appealable, because it constituted "a practical denial of certain relief to which the intervenor (appellant) is fairly entitled and which he can only obtain by intervention". *In re Columbia Real Estate Co.*, 112 F. 643, 645.

The true test of whether or not the instant application should have been granted can only be found in an analysis of the right conferred by Sections IV and V of the Consent Decree. The general rule concerning interventions, Rule 24, does not limit these specific rights set forth in the Consent Decree.

The suggestions contained on pages 30 to 33 inclusive that the application seeks relief broader than that contemplated by Sections IV and V of the Consent Decree is answered merely by pointing out that, if so, the District Court should and will correctly limit the relief. The application contains a prayer for general relief, but within the "limited purpose" permitted by Section V.

III. Reply to Point III.

(a) *Re:* Contention Application is Not Timely.

Under Point III Columbia Gas urges that the application was properly denied because not timely. This contention is based upon language in Rule 24. We have pointed out that Rule 24 does not govern. The argument about timeliness is merely another way of saying that laches constitutes a defense. Nothing is in the record to show that Columbia Gas or Columbia Oil changed position to their disadvantage because this application was not made immediately after Columbia Oil acquired the stock and Columbia Gas acquired the Detroit extension.

On the other hand, as we pointed out in the application (R. 531, 535-537) Columbia Gas has, through its illegal acts and violations of the Consent Decree, obtained property rightfully belonging to Panhandle Eastern, whereby Columbia Gas and Columbia Oil have secured "to themselves a further monopoly in the commerce of natural gas in Indiana, Ohio and Michigan" (R. 536). The application points out that through the March 17, 1936 contract, Columbia Gas was able to control the markets in Indiana, Ohio and Michigan and sell gas "at prices and on terms satisfactory to Columbia Gas" (R. 537).

Through Michigan Gas, Columbia Gas "has received and is now receiving excessive profits therefrom, all in violation of the express provisions of the decree aforesaid" (R. 531). In view of this Columbia Gas cannot urge the defense of laches or untimeliness. *Bay Newfoundland Co.* v. *Wilson & Co.*, 4A. 2d. (Del. Ch.) 668 at 671.

(b) *Re:* Contention Individual May Not Participate in Government Anti-Trust Suit.

It is contended by the appellees that the dismissal of the applications is supported by the following cases, because of the asserted conflict and because of a supposed rule that an individual may not participate in a suit brought under the anti-trust laws by the Attorney General of the United States.

United States v. *Northern Securities Co.*, 128 Fed. 808;

Buckeye Coal & Ry. Co. v. *Hocking Valley Ry.*, 269 U. S. 42.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578;

United States v. *Radio Corporation*, 3 F. Supp. 23;

(Brief of Columbia Gas, pp. 39-44; of Columbia Oil, pp. 56-59).

But these cases and some others now referred to show that the applications should have been allowed and that their dismissal was error.

In *United States* v. *Terminal Railroad Assn.*, 236 U. S. 194, parties whose interest was more remote and much less substantial and certain than the interest of these applicants, were permitted to intervene for modification of a decree in an anti-trust case. The interveners were merchants located on the lines of the Terminal Association, for whom the Association performed local transportation service. An objection to intervention by the Attorney General was overruled. This Court said:

> "The challenge by the United States of the right to hear the intervening petitioners is without merit, since even, although the petitioners were not parties, they are entitled to be heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights" (p. 199).

The Court ordered that the decree be so modified as to permit the Terminal Association to serve the interveners.

In *United States* v. *Reading Co.*, 273 Fed. 848, intervention of preferred and common stockholders of a corporation defendant in an anti-trust dissolution case, was permitted by a three judge court. There the question was with regard to the provisions of a decree to dissolve a combination in the anthracite coal trade. The action was approved in *Continental Insurance Co.* v. *United States*, 259 U. S. 156.

The *Terminal Association* case and the *Reading* case recognize the obvious propriety and desirability of permitting the intervention of parties whose property or business interest may be affected by the provisions of an anti-trust decree.

In *Buckeye Coal & Ry. Co.* v. *Hocking Valley Co.*, 269 U. S., 42; 203 Fed. 295; parties whose interest was in mortgage liens upon their lands were permitted to intervene. The intervention was granted, although the relief sought, i.e., the cancellation of the liens, was denied.

(c) and (d) The Application Does Not Seek to Introduce New Issues Nor Attack or Modify the Decree.

Cases like *United States* v. *Radio Corporation*, 3 F. Supp. 23, and *United States* v. *Northern Securities Co.*, 128 Fed. 808, in which intervention was denied to parties who sought to attack anti-trust decrees, to pull them up by the roots, so to speak, do not support a rule against parties who seek the relief specifically provided for by a decree and who seek to procure relief in perfect accord with the anti-trust laws, not in conflict with the existing decree, and whose action if successful will promote the policy of the anti-trust laws to protect the private and public interests affected.

The contentions that the application seeks to introduce new issues and that under settled rules of practice intervention will not be permitted after entry of the decree are answered by the simple fact that the only relief sought is that specifically provided for by the Consent Decree. See *infra*, pages 32-39.

IV. Reply to Point IV.

In its Point IV Columbia Gas seeks to raise the defense of *res adjudicata*. We have pointed out *supra*, pages 16 to 21, that the defense of *res adjudicata* cannot properly be invoked.

PART III.

Reply to Brief of Government.

A. Government's Position.

The reasons given by the Government in its memorandum for its opposition to the relief sought by the instant applications is merely that the litigation pending in the District Court would be protracted. On page 8 the Government points out in a note that:

> "The public interest would probably be served by either plan."

The Government apparently is not certain that even if the Plan considered by the Court below is put into effect it will terminate the illegal control, as we find on pages 7 and 10 the Government saying that *"it is believed"* the Plan will terminate the illegal control. The Court below, although indicating it would approve the Plan, stated in its opinion that the changes are such that the effect will be that "the influence of Columbia Gas over Columbia Oil will be *minimized* or removed."

B. Contention Applications Moot.

The Government contends that the relief sought by the instant applications has become moot because Judge Nields handed down an opinion on January 18, 1941 stating that he would approve the Plan *upon certain conditions being met.* But the conditions, namely, the approval of the Securities & Exchange Commission, and the sale by certain stockholders of their Columbia Oil stock, *may never be met,* and no decree approving the Plan can be entered until they are met. The Court below has only said that *if* certain blocks of Columbia Oil stock, including 65,872 now owned

by Philip G. Gossler, the present Chairman of the Board of Columbia Gas, are sold, and the approval of the Securities & Exchange Commission is secured, the Plan will be approved. Thus one of the principal original conspirators, Gossler himself, can indefinitely postpone the entry of the new decree by simply holding his Columbia Oil stock, meantime maintaining the presently existing restraint of trade in exactly the same form which was condemned by the Government petitions of January 12 and May 15, 1939.

Furthermore, as the Court below said:

> "The plan by its terms is made subject to the approval of the Securities and Exchange Commission and to such corporate action by stockholders of Columbia Oil as may be necessary and appropriate" (Government Brief, p. 19).

What assurance is there that the S. E. C. or Columbia Oil stockholders will approve? And when?

And, as the Government's objections to the Plan have *not* been met (see discussion immediately following), an appeal *may* be taken from any new decree.

C. Errors in Government's Brief.

We call attention to certain errors of fact contained in the Memorandum for the United States (hereinafter called the Government Brief) filed herein:

(1) On page 6 the Government states:

> "The United States as plaintiff in the cause below did not object to the approval of that plan provided that certain conditions be included therein. The District Court in its opinion directed the inclusion of those conditions."

This is an error. The Government objected to the approval of the Plan unless certain blocks of common stock of

Columbia Oil be disposed of by the owners, and included in the designated blocks are 30,358 shares held by Mrs. Katherine Clay, daughter of Mr. Gossler, and 25,009 shares held by E. W. Edwards, a former director of Columbia Gas (R. 403-404, 391). See statement to this effect in opinion of District Court annexed to Government Brief, page 24. The District Court's opinion contains no indication that the final decree will provide that these blocks of stock be sold as the Government's objection sought, but instead said:

> "A different situation, however, exists with respect to the stock of Edwards and of Mrs. Clay, daughter of Gossler. Neither of those persons is a defendant in this cause. The court has no jurisdiction or control over them. Edwards has not been a director of Columbia Gas since 1938. Possibly some agreement may be reached by the parties with respect to the treatment of these two blocks of stock before the time arrives for the entry of a final decree" (Government's Brief, pp. 26, 27).

(2) On page 4 of its Brief the Government states that the

> "reorganization of Panhandle Eastern, readjustment of Columbia Oil's interest in Panhandle Eastern, and readjustment of Columbia Gas' interest in Columbia Oil"

was *"pursuant to"* the provisions of the original consent decree. That is not the fact as the consent decree shows. The "readjustment of Columbia Oil's interest in Panhandle Eastern" included the acquisition of a majority of the common stock, and all of two issues of preferred stock, which is characterized as a violation of the anti-trust laws in the Government's petition of May 15, 1939 (R. 348).

(3) On page 6 of its Brief the Government states that the District Court "approved the Plan". The District

Court did not approve the Plan as the same was presented to it by the Columbia Companies. The District Court stated that *it would approve the Plan upon certain conditions being met.* The Court said:

> "Final approval of the plan and amendment of the consent decree will be conditioned upon the prior disposal by Gossler to another person or persons having no direct or indirect interest in or connection with Columbia Gas of any and all common stock of Columbia Oil which he may own.
>
> "Similar considerations apply to the stock held by officers and directors of Columbia Gas. They should not be interested in voting securities of Columbia Oil." (Government Brief, p. 26.)

(4) In its final paragraph on page 11, the Government takes the position that the decision of the District Court has resulted in the Consent Decree being changed and "the substitution of an entirely new plan". That is not the case. The District Court has indicated that upon certain conditions being complied with (see *supra*) it will enter a final decree approving the Plan advanced by the Columbia Companies. No final decree has been entered and therefore the Consent Decree is still in full force. There is no showing in this record or in the opinion of the Court below (annexed to the Government's Brief) that the voluntary Plan will ever be approved or the present Consent Decree ever be modified.

(5) On page 9 the Government seeks to show the difference between the proposed Plan and the relief sought by the instant applications. Several misstatements are made:

> (a) The Plan does not give Panhandle Eastern a firm option for one year but merely a refusal which could very easily be used to prevent Panhandle Eastern from ever acquiring the Detroit extension (R. 361).

(b) The instant applications do not seek the appointment of a trustee "to retain and dispose" of the extension, but instead to hold the same as trustee for Panhandle Eastern (R. 423-424, 539).

(c) The Government states that the Plan looks to a segregation of control "at a point between Columbia Gas and Columbia Oil; whereas the applications now on review seek divestment at the point between Columbia Oil and Panhandle Eastern th ugh the enforced sale of Columbia Oil's stock ownership in Panhandle Eastern". That is not the case. The applications on appeal do not seek divestment through sale of any of Columbia Oil's stock ownership of Panhandle Eastern; instead they seek only to eliminate the voting rights incident to certain parts of that stock and only to those parts which are alleged to be illegally held (R. 424, 539).

D. Contention Relief Sought Inconsistent with Consent Decree and Proposed Plan.

Appellees assert that these applications constituted an attack upon the consent decree and are made for the purpose of modifying and impeaching that decree. (Briefs in No. 268 of Columbia Gas, pp. 52, 53; and of Columbia Oil, p. 61.) The Memorandum of the United States asserts that there is a conflict between the proposed new decree and the relief sought by the appellants.

In fact, the relief sought by the appellants is in complete accord with the objectives of the Consent Decree, it will promote a dissolution of the unlawful restraint and monopolization, and will not prevent the operation of any provision of the existing Consent Decree or the proposed new decree. This will be shown by comparing the relief sought in these applications, the traditional remedy heretofore applied in similar cases, and the provisions of the proposed new decree.

The acquisition of a majority of the stock of Panhandle Eastern was the principal means used by the defendants to effectuate and maintain the unlawful restraint and monopolization. Hence, the simple, certain and prompt method of ending the unlawful condition would have been the complete and absolute divestiture of that stock, the obvious remedy being simply to undo what has been done. In all other similar anti-trust cases in which the United States has prevailed that method has been used; that is to say, there has been a divestiture of the very stock or other property unlawfully acquired. During the fifty years from the enactment of the Sherman Act in 1890 to the present time, there have been twenty-nine such cases, not including this case.* In the twenty-three in which the United States has either prevailed or accepted a consent decree, the decrees have required a divestiture of stocks, properties, bonds, liens, leases, etc., for the purpose of effecting a dissolution of the combination. This case is the only exception.

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*1. *U. S.* v. *E. C. Knight Co.*, 60 Fed. 306; 60 Fed. 934; 156 U. S. 1. Dismissed.
2. *U. S.* v. *Northern Securities Co.*, 120 Fed. 721; 193 U. S. 197. March 14, 1904.
3. *U. S.* v. *Standard Oil Co.*, 172 Fed. 177; 221 U. S. 1. July 29, 1911.
4. *U. S.* v. *American Tobacco Co.*, 164 Fed. 700; 221 U. S. 106. Nov. 16, 1911.
5. *U. S.* v. *Du Pont Co.*, 188 Fed. 127. June 13, 1912.
6. *U. S.* v. *Union Pacific R. R. Co.*, 188 F. 102; 226 U. S. 61; 266 U. S. 470. June 30, 1913.
7. *U. S.* v. *Great Lakes Towing Co.*, 208 Fed. 733; 217 Fed. 656. Relief refused—no corporate combination case made out.
8. *U. S.* v. *American Sugar Refining Co.*, Southern District, New York. Consent decree, May 9, 1922.
9. *U. S.* v. *Lake Shore Ry. Co.*, 203 Fed. 295. March 14, 1914.
10. *U. S.* v. *U. S. Steel Corporation*, 223 Fed. 55; 251 U. S. 417. Dismissed.
11. *U. S.* v. *United Shoe Machinery Co.*, 222 Fed. 349; 247 U. S. 32. Dismissed.

The prayers for relief in the several petitions and complaints filed in this case by the United States followed those cases. Thus, divestiture of the Panhandle Eastern stock was demanded in the original petition of March 6, 1935; again, in the first Amended and Supplemental Petition of October 30, 1935 (R. 30); again, in the second Supplemental Complaint of January 12, 1939 (R. 281); and finally, in the third proposed Amended and Supplemental Complaint of May 15, 1939 (R. 348). But the United States does not now insist on that relief.

The view of the special master, to whom was referred the proposed new decree, was to the same effect. He stated

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12. *U. S.* v. *International Harvester Co.*, 214 Fed. 987. Nov. 2, 1918.
13. *U. S.* v. *Corn Products Co.*, 234 Fed. 964. Nov. 13, 1916.
14. *U. S.* v. *Eastman Kodak Co.*, 226 Fed. 62. June 20, 1916.
15. *U. S.* v. *Quaker Oats Co.*, 232 Fed. 499. Dismissed.
16. *U. S.* v. *Reading Co.*, 226 Fed. 229; 253 U. S. 26. June 6, 1921.
17. *U. S.* v. *American Can Co.*, 230 Fed. 859; 234 Fed. 1019. Dismissed.
18. *U. S.* v. *Southern Pacific Co.*, 239 Fed. 998; 259 U. S. 214.
19. *U. S.* v. *Lehigh Valley R. R. Co.*, 225 Fed. 399; 254 U. S. 255. Nov. 7, 1923.
20. *U. S.* v. *New York, New Haven & Hartford R. R.*, Southern District, New York. Consent decree, Oct. 7, 1914.
21. *U. S.* v. *New England Fish Exchange*, District of Mass., 258 Fed. 932. Dec. 4, 1919.
22. *U. S.* v. *Swift & Co.*, Supreme Court, District of Columbia. Consent decree, Feb. 27, 1920.
23. *U. S.* v. *Cement Securities Co.*, District of Colorado. Consent decree, Dec. 13, 1924.
24. *U. S.* v. *Ward Food Products Co.*, District of Maryland. Consent decree, April 3, 1926.
25. *U. S.* v. *National Food Products Corporation*, Southern District, New York. Consent decree, March 4, 1926.
26. *U. S.* v. *Rand Gardex Bureau*, Southern District, New York. Consent decree, Dec. 9, 1926.
27. *U. S.* v. *Fox Theatres Corporation*, Southern District, New York. Consent decree, April 15, 1931.
28. *U. S.* v. *Foster & Kleiser Co.*, Southern District, California. Consent decree, March 13, 1931.
29. *U. S.* v. *Radio Corporation of America*, District of Delaware. Consent decree, Nov. 21, 1932.

that divestiture of the Panhandle Eastern stock "would be much *simpler* from a procedural point of view, would be *sure* to accomplish the result intended by the consent decree and would be acceptable to the Government." (R. 371, 381, 394.)

No party to this case has even attempted to controvert the efficacy of a divestiture of the Panhandle Eastern stock, or has cited any reason for failure to apply that remedy. This record contains no evidence of any fact to support any reason for avoidance of that remedy. Hence, it is safe to assume that that remedy has not been avoided because of its inapplicability to this case.

The inefficacy of the Consent Decree and the proposed new decree is not an issue on these applications, as that issue could not be raised by Panhandle Eastern under the limited purpose of these applications. These applications could not be based upon the proposition that those decrees are inadequate. The United States asserts, however, that the Consent Decree has failed utterly, and it is ostensibly because of that dissatisfaction that the defendants have proposed the new decree (R. 338, 340).

That divestiture of the very stock unlawfully acquired has been the traditional remedy, is mentioned merely to show that the return of 80,000 shares of the unlawfully acquired Panhandle Eastern stock and transfer of the Detroit extension, as sought by the appellants, are in accord with the well settled remedy and with the objectives of the anti-trust laws. The provisions of the proposed new decree are mentioned, not to show their inefficacy or to ask that they be changed, but merely to show that the return of the 80,000 shares and transfer of the Detroit extension, may be made without interfering in the slightest degree with those provisions.

The principal provisions of the proposed new decree are the following:

1. *As to the relation between Columbia Gas and Columbia Oil.* Columbia Gas will divest itself of 400,000 shares of preferred stock of Columbia Oil, by transferring it to Columbia Oil (R. 358-359).

2. *As to the relation between Columbia Gas and Michigan Gas.* Columbia Gas will sell Michigan Gas, giving Panhandle Eastern a one year refusal to buy (R. 361).

3. *As to the relation between Columbia Oil and Panhandle Eastern.* The Department of Justice is to have a veto privilege as to officers and directors of Columbia Oil and Panhandle Eastern. The plan for the proposed decree states:

> All officers and directors of Columbia Oil shall resign upon the entry of the order and the approval of the Plan by the Securities and Exchange Commission (to the extent required by law), and be replaced by officers and directors *not objectionable to the Department of Justice,* such directors to own no stock or securities of Columbia Gas. Such directors shall not include anyone who is now, or ever has been, an officer, director or employee of Columbia Gas or any of its subsidiary companies.
>
> * * * * * *
>
> the representatives of Columbia Oil on the Board of Directors of Panhandle Eastern shall be directors of Columbia Oil (R. 360-361).

The veto privilege is to be limited to five years, after which the protection ceases (R. 393).

Columbia Oil will "agree to use its best efforts to dispose of the $10,000,000 Class A preferred stock of Pan-

handle Eastern owned by it . . ." (R. 359). Note that disposition is not mandatory, but depends upon the mere volition of Columbia Oil. *There is not even an allusion to disposition of the $1,000,000 of Class B preferred stock, which elects two directors. That is to be retained by Columbia Oil.*

The proposed new decree has been formulated and offered, not by the Attorney General, but by the defendants. The conspicuous facts about it are its many serious omissions. They are: No separation between Columbia Oil and Panhandle Eastern. No dissolution of the general community of stockholders of Columbia Gas and Columbia Oil, except that the Court below, as a condition to its final approval of the plan, will require a complete and absolute divestiture by certain stockholders of their shares in Columbia Oil (Brief of U. S., p. 26). No change is absolutely required in the status of debtor and creditor which obtains between Columbia Oil and Columbia Gas, whereby Columbia Gas holds the entire funded debt of Columbia Oil, in the amount of $21,000,000.

It is evident that the court below feels no assurance that the proposed new decree will be effectual to end the restraint and monopoly. After reviewing the provisions of that decree, the court states that *"the influence of Columbia Gas over Columbia Oil will be minimized or removed"* (Government brief, p. 20). A decree which merely reduces the unlawful influence, or merely reduces a restraint and monopoly, does not meet the requirements of the law, whose objective is to completely and certainly end such conditions.

The prayers of the Appellants' applications relative to the Detroit extension provide for transfer by Columbia Gas of the stock of Michigan Gas to a trustee for the benefit of Panhandle Eastern and for repayment to Columbia Gas of all sums advanced by it to or for Michi-

gan Gas, less dividends and money received from Michigan Gas.

The provisions of the proposed decree on the same subject are that an option will be given to Panhandle Eastern to purchase the Detroit extension (otherwise known as Michigan Gas Transmission Corporation), at actual investment; and if that option is not exercised or a sale is not made elsewhere, a trustee shall be appointed to make a sale (R. 361). Thus, the appellants seek, and the new decree proposes, a transfer of the Detroit extension. Both provide for an acquisition by Panhandle Eastern. The repayment of advancements by Columbia Gas and the return of dividends and profits to Panhandle Eastern prayed for by the appellants, are not inconsistent with the proposed decree. The differences, if any, are immaterial, and may be easily reconciled by the court below on mandate from this Court.

The prayers relative to the 80,000 shares of Panhandle Eastern common stock are that they be surrendered to Panhandle Eastern in exchange for securities without voting rights. Columbia Oil now has 404,326 shares of Panhandle Eastern common stock out of a total of 807,367 (R. 431) outstanding. A return of 80,000 shares would reduce its common stock holdings to 324,326, and its percentage of the total from a majority to a fraction over 40 percent. The appellees would no longer exercise control and be able to prevent that full and free development and extension of the Panhandle Eastern business which it is to the interest of Mokan to bring about, and which would follow an independent and unrestrained use of the Detroit extension.

The same is true of the relief sought relative to the preferred stock.

But the appellees contend that return of the 80,000 shares would be in conflict with the decree, on the theory that they are permitted by the decree to own and hold the Panhandle Eastern stock, and that that stock must be retained by them for the purposes of that decree (Brief of Columbia Gas, pp. 52, 53; of Columbia Oil, p. 62).

Neither the Consent Decree nor the proposed new decree, however, requires retention of any stock, securities, property of, or interest in, Panhandle Eastern by the defendants.

The contention is based on the erroneous view that the Consent Decree and the proposed new decree constitute a grant of rights to the defendants. Those decrees are limitations, not grants, of rights to the defendants. Their rights in the Panhandle Eastern stock are derived, like all property rights, from the general law. The prohibition of certain acts by the decrees are not grants of permission to do all acts not prohibited. If appellees' contention were correct, they would have no right to dispose of the Panhandle Eastern stock.

Another objection, equally untenable, is that the Consent Decree under which these applications have been made, has been "substantially repealed." (Government Brief, p. 4.) The theory must be that the act of the appellees in submitting another decree has wiped out the right of the Appellants to relief under the Consent Decree. How? Why?

But the Consent Decree has not been wiped out. No new decree has been entered, and may never be entered. See *supra*, pp. 28-29.

Respectfully submitted,

ARTHUR G. LOGAN,
Continental American Building,
Wilmington, Delaware.

ROBERT J. BULKLEY,
Bulkley Building,
Cleveland, Ohio.

RUSSELL HARDY,
Woodward Building,
Washington, D. C.
Of Counsel.

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